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Supreme Court of the United States,

OCTOBER TERM, 1939.

STATE OF WISCONSIN AND ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin, *Petitioners,* *vs.* F. W. WOOLWORTH CO., a New York corporation.	No. 893

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition seeks to review a judgment of the highest court of Wisconsin, reversing a judgment of the Circuit Court for Dane County and remanding the cause with directions to enter judgment setting aside an assessment and allowing the claim for refund made by F. W. Woolworth Co. under the so-called Wisconsin Privilege Dividend Tax Law.

The opinion below is *F. W. Woolworth Co.* v. *Wisconsin State Commission,* 289 N. W. 685 and is not yet officially reported.

Statement of Facts.

The Act (Chap. 505 of 1935 Laws of Wisconsin) is nominated a "Privilege Dividend Tax" "for the privilege of declaring and receiving dividends out of income derived and business conducted in this state".

Violation of State Constitution was invoked on the record (R. pp. 3, 13, 14, 15, 16, 17, 18, 46), and was assigned as error on the brief below (p. 5). The State Tax Commission found that the assessment was not constitutionally

objectionable (R. pp. 25, 26). The intermediate Court considered the questions as raised on briefs and particularly the constitutional question (R. p. 67). The Supreme Court, in reversing, stated no grounds in its judgment (R. p. 78) or in its opinion (R. p. 78) save a reference for reasons to its opinion in the companion *Penney* case, (*J. C. Penney Co.* v. *Wisconsin Tax Commission*, 289 N. W. 677) wherein it recited, at p. 679, that the plaintiff contended that the law as applied to a foreign corporation was invalid "for the reason that it deprives the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States *and Art. VIII, Sec. 1 of the Constitution of the state of Wisconsin*".

Limitations on the question by reason of the text of the Act. Chap. 505 of 1935 Laws of Wisconsin provides in Section 3:

> "*Privilege Dividend Tax.* (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign or local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.
>
> • • • • • •
>
> (4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. • • •"

Obviously, a dividend declared in Wisconsin by either a foreign or local corporation and whether paid to residents or non-residents, is intended to be taxed. But there is no legislative intention expressed or inferable that dividends, declared, as here, outside Wisconsin by a foreign corporation were intended to be taxed.

Limitations on the question by prior decisions of the Court below.

In *State ex rel. Froedert Grain & Malting Co. Inc.* v. *Tax Commissioner of Wisconsin*, 265 N. W. 672 the relator was a Wisconsin corporation doing business in Wisconsin and in Minnesota. The Court construed the act as imposing a privilege tax "upon the transaction involved of transferring the dividends from the corporation to its stockholders" and stated that as a property tax or as imposed upon a non-resident it would be unconstitutional.

In *State ex rel. Froedert Grain & Malting Co. Inc.* v. *Tax Commissioner of Wisconsin*, 267 N. W. 52, on rehearing, the Court again construed the acts as taxing dividends declared *within Wisconsin*, saying:

> "The declaration of a dividend is as much of a transaction within the State as is the making out of a stock certificate. • • • Of course it does not follow that the state may impose the instant tax in case of a foreign corporation because it may impose it in the case of a domestic corporation. *The declaring of a dividend by a foreign corporation and transmittal of it would be done without the taxing state, and neither would be a transaction within it, nor would the funds out of which the dividends were paid be located within the taxing state at the time of the payment.*"

The Court, it seems to us, left open, in respect of the taxability of dividends declared outside Wisconsin by a foreign corporation, a question of local law depending in turn on a question of fact, which it expressed as follows:

> "• • • whether the dividends involved in the instant transfer tax, which have been earned within the state, have not such a constructive situs within this state as to render them subject to the tax imposed by the instant statute."

This question of fact it could not decide because there were no facts in the record to justify a decision. It stated:

> "It is not permissible for us on demurrer to the complaint to consider the factual statements on this brief" (an *amicus curiae* brief). "Nor can we take judicial notice of facts in this regard."

The Court concluded to "consider" the question however and stated:

> "The *fact* that the dividends are derived from earnings within the state gives them a constructive situs within the state."

The stipulated facts in the record herein are as follows:

> "That all meetings of the board of directors of the company at which dividends are declared are held in the State of New York; that all acts of the company or its agents in connection with the declaration and payment of such dividends are performed within and pursuant to the laws of the State of New York, and that the funds out of which such dividends are paid are kept in the State of New York" (R. p. 44).

The uncontradicted facts establish that on 1 March, 1937 F. W. Woolworth Co. had over 9 million shares of stock; that, roughly speaking 99% of its stockholders, holding 99% of its stock and receiving 99% of its dividends, were non-residents of Wisconsin. No act regarding the declaration, paying or transmitting of the dividend is performed within the State of Wisconsin (R. pp. 33, 34).

Under the New York Law (Penal Law § 664) it is a crime for a director to concur in any vote or act of directors making a dividend "except from surplus, and in the cases and manner allowed by law". Surplus is not identical with earnings; nor are the earnings of a particular state or even of a particular year earmarked as a separate portion of the surplus.

Determination of no business situs in respect of dividend in Wisconsin.

In the companion *Penney* case (*J. C. Penney Co.* v. *Wisconsin Tax Commission*, 289 N. W. 677) the Court below, at p. 682, stated:

> "The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based."

Summary of Argument.

(1) The determination by the Court below that the dividend of the foreign corporation had no business situs in Wisconsin was a determination of fact, in respect of local law and should not be reviewed herein.

(2) That the Court below in its method of determining the business situs of corporate intangibles did not infringe the rules most recently laid down by this Court should preclude review.

(3) The non-federal ground is sufficient to sustain the judgment of reversal.

POINT I.

The determination by the Court below that the dividend of the foreign corporation had no business situs in Wisconsin was a determination of fact, in respect of local law, and should not be reviewed herein.

The questions which the petitioner seeks to raise herein have been finally determined either as matters of construction in the prior decisions of the highest court of Wisconsin, or as matters of fact and of local law herein. The question of constructive situs which in *State ex rel.*

Froedert Grain & Malting Co. Inc. v. *Tax Commissioner of Wisconsin*, 267 N. W. 52, the Court raised but could not determine because of absence of factual record, it has now finally decided.

The Courts of and in Wisconsin have determined in a long series of decisions that the stock of a corporation does not acquire a business situs in Wisconsin merely because the corporation does business in Wisconsin.

In *Newport Co.* v. *Wisconsin Tax Commission*, 261 N. W. 884, the Court below, construing the Wisconsin Tax Act, held it in certain respects unconstitutional, at page 889 saying:

> "This company, domiciled in Delaware, with plants in several states, made investments and used the profits for the general purposes of the company, and we fail to see how this income, or the stock itself, can be said to have acquired a business situs in Wisconsin, any more than in any other place where its business activities were carried on."

See also:

Tyler v. *Dane County, Wis.*, 289 Fed. 843 (D. C. W. D. Wis.);
Estate of Shepard, 184 Wis. 88.

The Court below has again determined this question and has decided that there is no business situs within Wisconsin and that there is no evidence in the record of any business situs within Wisconsin.

This is a determination in respect of local law which should be accepted by this Court as conclusive.

Dawson v. *Kentucky Distilleries*, 255 U. S. 288, per Brandeis, J., at page 292;
Laurel Hill Cemetery v. *San Francisco*, 216 U. S. 358, per Holmes, J., at page 365;
Kryger v. *Wilson*, 242 U. S. 171, per Brandeis, J., at page 176.

The petitioners themselves recognize (Petition, p. 10) that the decision relates only "to foreign corporations doing business in Wisconsin *under facts* the same as those existent as to the F. W. Woolworth Co."

Whether the law of the State in respect of business situs of dividends of foreign corporations be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of federal concern.

> *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, per Brandeis, J., at page 78.

The determination of fact—that there is no evidence in the record of business situs within Wisconsin—should not be reviewed by this Court.

> *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508, 509;
> *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 441;
> *United States* v. *Johnston*, 268 U. S. 220, 227;
> *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178;
> *Missouri K. & T. Ry.* v. *Zuber*, 256 U. S. 681;
> *National Labor Relations Board* v. *Waterman Steamship Corp.*, 84 L. Ed. 448, per Black, J.
> *Kansas City So. Ry.* v. *Albers Comm.*, 223 U. S. 573, 591.

POINT II.

That the Court below in its method of determining the business situs of corporate intangibles did not infringe the rules most recently laid down by this Court should preclude review.

In *Curry* v. *McCanless*, 307 U. S. 357, this Court at 366 in applying to the taxation of intangibles the rule of *McCulloch* v. *Maryland*, 4 Wheat. 316, 429 that the subjects over which the sovereign power of a state does not extend

are exempt from taxation, recognized jurisdictions depending both upon domicile of the owner of the intangible within the taxing state and upon the situs of the intangible within another taxing state.

In *Graves* v. *Elliott*, 307 U. S. 383, a power of disposition in respect of the intangible was held to justify taxation at the place of the domicile of the owner of the power.

In *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U. S. 313, the opinion of Mr. Justice Reed stated that there was a presumption that corporate intangibles were taxable solely by the state of the corporation's origin; that to be taxable elsewhere there must be definite evidence that the intangibles are integral parts of the business there conducted; that to overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of local activity.

1. The Court below has determined the fact and the local law without infringing any of these rules. The sovereign power of the state of Wisconsin does not extend to these dividends declared in New York by a New York corporation and paid by it to non-residents of Wisconsin. The Court below has held that there is no evidence in the record that these corporate intangibles have any business situs in Wisconsin. The New York dividends are certainly not definitely connected as an integral part of Wisconsin activity. The stipulated facts preclude any connection whatsoever. And the New York Penal Statute prohibits any connection whatsoever.

2. In view of *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, it cannot be said that the state Court "has decided a federal question of substance not theretofore determined by this Court" within the meaning of Rule 38 (5-a).

The attempt to distinguish the *Johnson* case (p. 18 of petition in *Penney* case) is unconvincing. California surely had as much connection with earnings from the reinsurance

of California risks, involved in the *Johnson* case, as Wisconsin did with the declaration in New York of dividends which it would be a crime to pay out of anything but "surplus", unsegregated as to source. The alleged difference does not involve any question of public importance, justifying review by this Court.

3. Petitioners also argue that the case has been decided "in a way probably not in accord with applicable decisions of this Court" (Rule 38(5)(a)).

Their contention in this respect (pp. 20-23 of petition in *J. C. Penney* case) is that an income tax measured in the same way as the "Privilege Dividend Tax" would be valid. While we do not concede that dividends declared in New York can be a measure of income taxable in Wisconsin, we regard the question of the nature of the tax as conclusively fixed by the holding of the Wisconsin Supreme Court in *State ex rel. Froedert Grain & Malting Co. Inc.* v. *Tax Commissioner of Wisconsin*, 265 N. W. 672 as one imposed upon the privilege of transferring the dividends from the corporation to its stockholders (whether the stockholders are residents of Wisconsin or not).

It is not argued that the decision of the Wisconsin courts that the tax is imposed on the privilege of making a dividend involves a federal question. There would be no substance to such a claim. Nor is there any merit in the claim that this Court should intervene to determine the validity of a tax on the theory that it would be constitutional if it were regarded as a different sort of tax from what the Wisconsin courts have interpreted it to be.

The argument (pp. 22-23 of Petition in *J. C. Penney* case) that it is a tax upon stockholders for the privilege of doing business in Wisconsin has no basis either in the Wisconsin court's construction of the Wisconsin law, or in the applicable decisions of this Court. It is far from constituting a "special and important reason" for granting review (Rule 38(5)).

POINT III.

The non-federal ground is sufficient to sustain the judgment of reversal.

The state and federal constitutions set forth similar grounds of invalidity in respect of the statute. Both state and federal constitutions were invoked by F. W. Woolworth Co. on the record throughout the proceeding below and in brief before the Supreme Court. Neither in judgment nor in opinion did the highest Court refer to either state or federal constitution. In its opinion it (*F. W. Woolworth Co. Wisconsin Tax Commission*, 289 N. W. 685) referred, at p. 686, to its opinion in the *Penney* case for its grounds of reversal—but there also, although it recites that violations of both state and federal constitution were raised, (*J. C. Penney Co.* v. *Wisconsin Tax Commission*, 289 N. W. 677, at p. 679) it does not state whether one or the other, or both, grounds resulted in reversal. The statements in the petition and brief that the reversal was for violation of the 14th Amendment (pp. 6, 8, 9, 11, 15, 16, 18, 19), are thus unwarranted. No certificate has been rendered. Federal jurisdiction may be found only if diligently sought after, against previously stated rules. The opinion below falls far short of complying with the rule that there must be an explicit statement that it reversed solely because of violation of the federal constitution.

Leathe v. *Thomas*, 207 U. S. 93, per Holmes, J. at page 98;
Lynch v. *New York ex rel. Pierson*, 293 U. S. 52;
Siler v. *Louisville & Nashville R. R.*, 213 U. S. 175, 193;
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, Brandeis concurring at page 347;
Bachtel v. *Wilson*, 204 U. S. 36, 41;
Johnson v. *Risk*, 137 U. S. 300, 307;
Wood Co. v. *Skinner*, 139 U. S. 293, 297;
Honeyman v. *Hanan*, 300 U. S. 14;
New York City v. *Central Savings Bank*, 306 U. S. 661.

After the Court below had in a prior case held that the declaring of a dividend by a foreign corporation and transmittal of it would be done without the taxing state, its determination herein in respect of the absence of business situs within Wisconsin of the foreign dividend made unnecessary the decision of any federal question and deprives this Court of jurisdiction.

Marrow v. *Brinkley*, 129 U. S. 178, 181.

POINT IV.

The petition for certiorari should be denied.

Respectfully submitted,

EDWARD CORNELL,
MARTIN A. SCHENCK,
ORRIN G. JUDD,
G. BURGESS ELA.